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UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

United States of America,  
  
Plaintiff,  
  
v.  
  
Christopher Matthew Clements  
  
Defendants.

CR 08-0303-TUC-DCB(CRP)

**GOVERNMENT'S RESPONSE TO  
DEFENDANT'S OBJECTION TO  
REPORT AND  
RECOMMENDATION OF  
MAGISTRATE RE: SUPPRESSION  
MOTIONS**

NOW COMES the United States of America, by its attorneys, DIANE J. HUMETEWA United States Attorney for the District of Arizona and SHELLEY K.G. CLEMENS, Assistant United States Attorney, and hereby submits its response to the Defendant's Objection to Report and Recommendation of the Magistrate re: Suppression Motions. The Government respectfully requests that this court overrule the defendant's objections to the Magistrate's findings and adopt the Magistrate's Report and Recommendation.

**I. FACTS**

The Government would adopt the facts as set forth by the Magistrate in his Report and Recommendation. The government refutes the statements set forth in the defendant's statement of facts. Only one officer approached the defendant inside the Circle K; the plainclothes officer waited at the door. (RT. 05/05/08 P. 70, 71.) The uniformed officer was not used as a show of authority. The defendant was never "surrounded", nor was he escorted

1 or directed to the side of the building. (RT. 05/05/08, P. 20, 57, 71, 72.) The encounter was  
2 a consensual encounter and not an interrogation.

## 3 **II. ARGUMENT AND AUTHORITY**

4 In his objections, the defendant asserts that his arrest, as well as any evidence derived  
5 the encounter with law enforcement was an unlawful seizure by law enforcement. The  
6 defendant further argues that any statements made by him during the police contact on  
7 October 5, 2007, should be suppressed as they were the product of a custodial interrogation  
8 and subject to *Miranda* restrictions.

9 First, the defendant's identity cannot be suppressed, regardless of the legality of the  
10 encounter. Second, the contact with the defendant was a consensual, non-custodial encounter  
11 to determine his identity and nexus to the structure they had under surveillance. And finally,  
12 once the defendant provided false information to the officer, he committed a new offense in  
13 the officer's presence which gave the officers has reasonable suspicion to detain him in order  
14 to satisfy their suspicions, as well as probable cause to place him under arrest for a state  
15 charge of giving false information to a law enforcement officer.

### 16 **A. THE DEFENDANT'S IDENTITY IS NOT SUPPRESSIBLE.**

17 The defendant makes many suppositions regarding the intent of the officers, but he  
18 provides no authority refute that the identity of a defendant "is never itself suppressible as  
19 a fruit of an unlawful arrest." *United States v. Guzman-Bruno*, 27 F.3d 420, 421 (9<sup>th</sup> Cir.  
20 1994). In addition, an officer can ask an in-custody defendant for identifying information  
21 without first providing Miranda warnings. *Pennsylvania v. Muniz*, 496 U.S. 582, 601  
22 (1990); *United States v. Perez*, 776 F.2d 797, 799 (9<sup>th</sup> Cir 1985). Even if the defendant were  
23 in custody during any part of the contact with law enforcement, neither his identity or any  
24 statements from him regarding his identity could be suppressed.

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1 **B. THE STATEMENTS OF THE DEFENDANT ARE ADMISSIBLE AS PART OF**  
2 **A CONSENSUAL, NON-CUSTODIAL, ENCOUNTER.**

3 The government also seeks to introduce evidence that the defendant provided two false  
4 names, as well as finally admitting his correct identity, while speaking with the officers. The  
5 defendant argues that these statements were the result of a custodial interrogation sans  
6 *Miranda*, and therefore inadmissible. In his Objections to the Magistrate's Report and  
7 Recommendation, the defendant states that the court must focus on whether "the officers  
8 knowingly made a show of authority to Mr. Clements inside the convenience store," to  
9 support his assertion as to why the defendant did not feel he was free to leave. However, that  
10 is not the appropriate inquiry.

11 It is well established that the Fourth Amendment is not implicated when law enforcement  
12 officers merely approach an individual in public and ask him if he is willing to answer  
13 questions. *See Muehler v. Mena*, 544 U.S. 93, 101, 125 S.Ct. 1465, 161 L.Ed.2d 299 (2005);  
14 *see also Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *United*  
15 *States v. Mendoza-Cepeda*, 250 F.3d 626, 628 (8th Cir.2001). See also *Orhorhaghe v. INS*,  
16 38 F.3d 488, 494 (9th Cir.1994). In addition, in order for a statement to be inadmissible  
17 pursuant to *Miranda*, the statement must be the result of a custodial interrogation. *Miranda*  
18 *v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Whether an individual is  
19 in custody for purposes of *Miranda* depends on the totality of the circumstances at the time  
20 the defendant is interviewed. *United States v. Allen*, 699 F.2d 453, 458 (9<sup>th</sup> Cir. 1982). A  
21 trial court must determine if a reasonable person in the defendant's position would conclude  
22 that he was not free to leave. *Id.* at 324; *United States v. Booth*, 669 F.2d 1231, 1235 (9<sup>th</sup> Cir.  
23 1981). Neither a police officer's subjective intent nor a defendant's unusual susceptibilities  
24 are relevant to the inquiry. *Stansbury v. California*, 511 U.S. 318, 323, 325 (1994). The  
25 ultimate question, however, is whether there was "a formal arrest or restraint on freedom of  
26 movement of the degree associated with a formal arrest." *Stansbury v. California*, 511 U.S.  
27 at 325.  
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1 One would presume that any time an officer, particularly a uniformed one, approaches  
2 someone in the street, that it would be known the officer is in a position of authority. That  
3 does not necessarily mean that the encounter is custodial or that the defendant made  
4 any non-voluntary admissions. Officer Morin requested the defendant's assistance in  
5 answering a few questions, and asked him if he would step outside. (RT 05/05/08 P. 56, 57.)

6 The defendant agreed. (RT 05/05/08 P. 57.) Officer Morin did not lay hands on the  
7 defendant and remove him from the Circle K. (RT 05/05/08 P. 59.) The purpose of the  
8 inquiry was to establish the defendant's identity, and to determine if he knew anything about  
9 the location in question. (RT 05/05/08 P. 40, 46, 50. ) As no time was the defendant  
10 restrained or advised he could not leave until he was placed under arrest. As such, there was  
11 no Fourth Amendment seizure.

12 In addition, since he was not seized until after the second false name was given, he was  
13 not in custody. As such, any questions asked of the defendant up to that point were part of  
14 a non-custodial, consensual encounter, and no Miranda warnings were required.

15 Even if the court determines that the defendant was "seized" once Officer Morin  
16 admonished him of the consequences to tell the truth, at that point, Officer Morin would have  
17 been justified from that point forward in detaining the defendant as part of a valid  
18 investigatory stop. At that point, the defendant had given the officer false information in the  
19 form of a false name, which was a violation of law. The officer would have been justified  
20 in detaining the defendant as part of a *Terry* stop to determine what the defendant's true  
21 identity was. *See United States v. \$25,000 U.S. Currency*, 853 F.2d at 1506-1507. From  
22 that point, the detention, if any, lasted no longer than necessary to effectuate the purpose of  
23 the detention, which was to determine the defendant's identity.

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1 **IV. CONCLUSION**

2 WHEREFORE, PREMISES CONSIDERED, the government respectfully requests that  
3 this court deny the defendant's Objections to the Magistrate's Report and Recommendation  
4 and adopt the magistrate's recommendation. The defendant's identity cannot be suppressed  
5 regardless of the legality of the contact with officers. In addition, there was not an unlawful  
6 seizure of the defendant as the contact with the defendant was consensual. His statements  
7 were made voluntarily and were the product of a non-custodial interview.

8 Respectfully submitted,

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10 DIANE J. HUMETEWA  
11 United States Attorney  
12 District of Arizona

13 *S/ Shelley K.G. Clemens*  
14 SHELLEY K.G. CLEMENS  
Assistant U.S. Attorney

15 Copy of the foregoing served electronically  
16 or by other means this 2<sup>nd</sup> day of July, 2008, to:

17 John Kaufmann, Esq.  
18 Attorney for the defendant  
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